SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 683

ATLANTIC COAST LINE RAILROAD COMPANY,
BOSTON AND MAINE CORPORATION, and
DES MOINES UNION RAILWAY COMPANY,
Petitioners,

v.

BROTHERHOOD OF RAILROAD TRAINMEN,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Brief of Record Service, Inc., Washington, D. C.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
The Writ Should Not Be Granted	10
I. The issue of whether the Respondent is required to engage in national handling of the crew-consist disputes raised by the Section 6 notices of June and July 1965 is res judicata that there is no such requirement	10
II. The Petitioners' failure to object to the National Mediation Board's assumption of jurisdiction of the crew-consist disputes estops the Petitioners from contending now that negotiations prior to mediation did not satisfy the bargaining requirements of the Railway Labor Act	13
III. The Court below was clearly right in holding that the Railway Labor Act does not require that disputes over the issue of crew consist be negotiated in national handling	15
IV. Assuming a past history of national handling of crew-consist issues, the Respondent's withdrawal from national handling was lawful	23
Conclusion	25

TABLE OF CITATIONS

CASES:

American Ship Building Co. v. N.L.R.B., 380 U.S. 300 (1965) 25

Bhd. of Locomotive Firemen and Enginemen, et al. v. Chicago, B. & Q. R.R., 225 F. Supp. 11 (D.D.C., 1964) 3

Bhd. of Railroad Trainmen, et al. v. The Akron & Barberton Belt R.R. et al. (D.C. Cir., decided May 12, 1967), 65 LRRM 2229 ..... 5, 12

Page

California v. Taylor, 353 U.S. 553 (1957) 19
Detroit Newspaper Publishers Assn. v. N.L.R.B., 372 F. 2d 569 (6th Cir. 1967) 17, 25
Kennedy v. Long Island R.R., 211 F. Supp. 478 (S.D. N.W., 1962) 19, 20
N.L.R.B. v. Brown, 380 U.S. 278 (1965) 25
Publishers Assn. of New York City v. N.L.R.B., 364 F. 2d 293 (2d Cir. 1966), cert. den. 385 U.S. 971 (1966) 24, 25

ADMINISTRATIVE DECISIONS:

Chicago Metropolitan Home Builders Assn., 119 NLRB No. 141, 41 LRRM 1251 (1957) 15

STATUTES:

Public Law 88-108, 77 Stat. 132 ..... 3, 10

Railway Labor Act, 45 U.S.C. 151-164, 48 Stat. 1185

Section 1, Sixth 16, 17
Section 2, First 18
Section 2, Second 16, 17
Section 6 ..... *passim*
Section 10 22

MISCELLANEOUS:

Railroads v. Operating Brotherhoods, 41 Labor Arbitration Reports 673 19

Report of the Presidential Railroad Commission 10

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OPINIONS BELOW

The opinion of the District Court (Appendix A to the petition) is reported at 262 F. Supp. 177. The opinion of the Court of Appeals (Appendix B to the petition) has not yet been officially reported. It is unofficially reported at 66 LRRM 2115.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether the Respondent acted unlawfully in refusing to engage in national handling with Petitioners concerning the disputes raised by the Respondent's Section 6 crew-consist notices of June and July 1965 is res judicata that it did not act unlawfully.

2. Whether the Petitioners' failure to object to the assertion of jurisdiction by the National Mediation Board of the crew-consist disputes on the ground that the Respondent had failed to negotiate in good faith prior to mediation constituted a waiver of such objection by Petitioners.

3. Whether the Petitioners have the right to require Respondent to engage in national handling of the crew-consist disputes when prior handling of crew consist on a national basis has never resulted in agreement; when the most recent attempt at national handling of crew consist led to the brink of a nationwide railroad strike which was averted only by the intervention of the Congress; and when the National Mediation Board has refused the Petitioners' request to conduct mediation on a national level and has instead conducted separate mediation between the parties on the several railroads on which crew-consist disputes are pending.

4. Whether the Respondent, assuming a history of national handling of crew consist between the parties, is required to engage in national handling of the crew-consist disputes notwithstanding the Respondent's timely and unequivocal insistence that negotiations of the disputes be confined to the properties of the individual Petitioners on which the disputes arose.

STATEMENT OF THE CASE

This action is the third in a series of actions brought by the Petitioners to frustrate the efforts of the Respondent to resolve the separate disputes between the individual General Chairmen of the Respondent and approximately 100 railroads concerning the manning of train crews in road and yard service (commonly referred to as "crew consist" as opposed to crews employed in locomotives).

The first episode occurred in January 1966 when the railroads, including Petitioners, commenced a suit in the District of Columbia for declaratory judgment and injunctive relief involving the rights of the parties subject to the Award of Arbitration Board No. 282 established by the Congress pursuant to Public Law 88-108 (77 Stat. 132).[1] One of the issues presented to the Court in that case was the validity and effectiveness of notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) served by General Chairmen of the Respondent on approximately 80 railroads in June and July, 1965. The notices proposed changes in crew-consist rules to become effective January 26, 1966, after the expiration of the Arbitration Award. The railroads, including Petitioners, took the position that the notices were premature and refused the General Chairmen's requests that negotiations of the subject matter of the notices commence.

The District Court, on April 6, 1966, adjudged that the notices were premature and that the railroads were

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[1] The events leading to the enactment of Public Law 88-108 and the Award of Arbitration Board No. 282 are described in detail in *Bhd. of Locomotive Firemen and Enginemen, et al.* v. *Chicago, B. & Q. R.R., et al.*, 225 F. Supp. 11 (D.D.C., 1964).

not required to negotiate until the expiration of the Arbitration Award. The Respondent took an appeal from that determination.

While that appeal was pending, on April 12, 1966, the second episode began. Once again the railroads, including the Petitioners, filed suit in the District of Columbia requesting the Court to declare that the Respondent had not satisfied the "conference" requirements of the Railway Labor Act with respect to the Section 6 crew-consist notices of June and July 1965.

The motion recited that following the service of the Section 6 crew-consist notices by the General Chairmen of the Brotherhood the railroads advised the General Chairmen that the notices were premature and refused to negotiate.[2] The Brotherhood thereafter had invoked the mediatory services of the National Mediation Board and the Mediation Board had docketed the disputes over the objection of the railroads.

In each instance, following the service of a Section 6 crew-consist notice by a General Chairman, the representative of the particular railroad proposed that if a crew-consist agreement was not reached on the property, the dispute be submitted to national handling. In each instance, the General Chairman refused the proposal and insisted that negotiations be confined to the individual railroad.

On May 31, 1966, the District Court entered its order declaring that "full-fledged" conferences within the meaning of the Railway Labor Act had not occurred, and that mediation could not be undertaken until such

[2] These facts are shown by the Joint Appendix in Nos. 861 and 863, October Term, 1967.

conferences were concluded. The Court directed the parties to begin conferences. The Respondent took an appeal from that determination.

On May 12, 1967, the Court of Appeals issued one opinion deciding both appeals taken by the Respondent. The Court held that the Section 6 crew-consist notices of June and July 1965 were not premature and that the railroads had violated the Railway Labor Act by refusing to negotiate with the General Chairmen prior to the expiration of the Arbitration Award. The Court further held that in those cases in which, following the railroads' refusal to negotiate, the General Chairmen had invoked the mediatory services of the Mediation Board, the railroads had forfeited their right to insist on further negotiations, that mediation had properly been invoked, and should continue. *Bhd. of Railroad Trainmen, et al.* v. *The Akron & Barberton Belt R.R., et al.*, not yet officially reported, unofficially reported at 65 LRRM 2229.[3]

The latest episode involving the *same* Section 6 crew-consist notices of June and July 1965, to which this petition is addressed, was commenced by Petitioners on November 1, 1966. The complaint once again sought relief in the nature of a declaratory judgment and injunction. (JA 2-16) The evidence at the trial of the action established the following facts:

Subsequent to the District Court's order of May 31, 1966, in which the Court had held that conferences must be resumed, the General Chairmen of the Respondent received requests from the railroads and the Mediation Board that negotiations resume on the

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[3] The railroads have petitioned this Court to review that determination. (No. 863)

individual properties between the General Chairmen and the railroads on which crew-consist proposals were pending. (JA 279; 375)

Although the Respondent believed that the District Court's order was not correct and that further negotiations were not required (a belief vindicated by the Court of Appeals' May 12, 1967 decision, *supra*) it did agree to resume negotiations without waiving its legal position that such conferences were not required. Negotiations thereafter were held on the local properties of the railroads, including each of the Petitioners. (JA 433)

In each instance, during the course of the negotiations, each of the Petitioners proposed, as it previously had proposed, that if agreement was not reached on the property the dispute be referred to national handling. In each case, the General Chairman responded, as he previously had responded, that he would not agree to national handling of the crew-consist dispute. (JA 433)

On August 2, 1966, James E. Wolfe, chief spokesman for the railroads, sent a telegram to the National Mediation Board on behalf of the railroads involved in which he stated that the parties had now complied with the conference requirements of the Railway Labor Act. He further stated that mediation of all the crew-consist disputes should be handled on a national basis and he requested the Mediation Board to schedule mass mediation of the disputes. (JA 396-397) The Mediation Board refused to follow Wolfe's suggestion and separate mediation sessions were held with respect to each of the Petitioners. (JA 119-120)

The mediatory efforts of the Mediation Board on each of the Petitioners were unsuccessful and the

Mediation Board proffered arbitration to the parties. In each case, the General Chairman notified the President of the Brotherhood, Charles Luna, that arbitration was not desired, and Luna relayed the information to the Mediation Board. (JA 281; 434) On October 4, 1966, the Mediation Board advised the parties that it was that day terminating its services with respect to each of the disputes. (JA 13)

The Petitioners' complaint of November 1, 1966, the complaint in this case, raised two basic issues. First, the complaint alleged that the General Chairman on each of Petitioners had not engaged in good faith negotiations with the representatives of Petitioners on the local properties. Second, the complaint alleged that even if negotiations on the individual properties were in compliance with the requirements of the Railway Labor Act, the Respondent nevertheless failed to satisfy its bargaining duty under the Act by refusing to negotiate the crew-consist disputes on a national basis. (JA 13-14)

The District Court rendered its opinion on January 16, 1967. It found that the General Chairmen of the Respondent had negotiated in good faith with each of Petitioners and had satisfied the requirements of the Railway Labor Act in that respect. (JA 435-438) The Petitioners did not appeal that ruling. The Court further found, however, that the Respondent had violated the Railway Labor Act by refusing to engage in national handling of the crew-consist disputes with the Petitioners as well as other railroads on which crew-consist disputes were pending. The Respondent appealed the decision of the District Court that national handling of the crew-consist disputes was required under the Railway Labor Act.

The Department of Justice, on behalf of the United States, sought and received leave of the Court below to file a brief *amicus curiae* seeking reversal of the District Court's ruling that national handling of crew-consist was mandatory.[4]

The Court of Appeals reversed the holding of the District Court and ruled that the Petitioners could not require the Respondent to negotiate the issue of crew consist on a national level. The Court concluded (App. to petition, p. 26a):

> "What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. Whether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical

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[4] The interest of the United States in seeking reversal was set forth in the following manner (Brief for the United States, pp. 2-3):

> "If its ruling stands, the district court has forced bargaining over the crew consist issue into a national mold—so that unless agreement is reached on that issue, the public may be confronted with another national railroad crisis. The Government believes that the Railway Labor Act does not require national handling on that heretofore local issue, without the consent of both parties to the dispute, and seeks to express that view in this brief, to protect the public interest in avoiding nationwide railroad strikes and threats of such strikes.
>
> "This brief is filed to present the views of the United States that the decision below is inimical both to the public interest and to the stated purpose of the Railway Labor Act of fostering the 'prompt and orderly settlement' of disputes in the railroad and airline industries."

> experience in handling any similar national movements. The history and realities of crew consist bargaining in this industry impel the conclusion that mass handling was not required by the statute for bargaining on that issue."

Since the decision of the Court below is founded upon the "history and realities of crew consist bargaining" in the railroad industry, we believe it would be helpful to describe briefly the history of bargaining on the issue of crew consist.

Initially (and this fact is undisputed), there is not now, nor has there ever been, a national crew-consist rule. To the extent that there is in existence agreements covering the subject of crew consist, and there are thousands of such agreements, *all* resulted from agreement between a particular railroad and the representative of its employees.

James E. Wolfe, the spokesman for Petitioners, testified that the issue of crew consist had been the subject of negotiations on a national level in 1941, 1944-1945, 1947, 1956, and 1959-1960. In each instance, the issue of crew consist was only one of the issues involved. (JA 135-136) The results of such bargaining are revealing of the effectiveness of national handling as it relates to crew consist.

With respect to the negotiations in 1941, 1944-1945, 1947, and 1956, the parties agreed that no crew-consist agreement could be reached on a national basis and in each case the part of the proposal dealing with crew consist was withdrawn. (JA 136)

With respect to the proposals of 1959 and 1960, as they related to crew consist, not only did national

handling fail to resolve the crew-consist disputes,[5] but such bargaining almost resulted in a nationwide railroad strike which was averted only by Congressional action in enacting Public Law 88-108 which provided for compulsory arbitration to resolve the dispute temporarily.

THE WRIT SHOULD NOT BE GRANTED

The Petitioners' basic argument comes down to the proposition that where the same or similar disputes are pending between a railroad union and a substantial number of railroads, it is unlawful for the union to progress the resolution of the disputes in a manner that will not lead to a national crisis if agreement is not reached. But for the fact that they convinced a district judge that they were right, we would characterize such argument as frivolous. But such issue should not have been reached in this case because Petitioners are precluded from even making the argument.

I. The issue of whether the Respondent is required to engage in national handling of the crew-consist disputes raised by the Section 6 notices of June and July 1965 is res judicata that there is no such requirement.

The primary reason for this Court to deny the Petitioners' request to review the decision of the Court below is that the "Questions Presented" by the petition

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[5] One part of the dispute arising in connection with the 1959-1960 proposals concerned the manning of crews on self-propelled machines. (JA 129) This aspect of the dispute was not considered as relating to crew consist. See Report of the Presidential Railroad Commission, Chapter 6. (JA 297-298) The issue was not referred to arbitration by Public Law 88-108 and agreement on this issue was resolved on a national level along with other matters in what is commonly known as the "White House Agreement" of June 25, 1964.

need not be reached in affirming that decision. This is so because the issue of whether the Respondent violated the bargaining requirements of the Railway Labor Act in its negotiation of the crew-consist proposals of June and July 1965 already had been litigated in prior actions between the parties to this action, wherein it was held that *no* further negotiations over these notices is required. Thus, the issue is res judicata and it may not be litigated in this action.

In our Statement of the Case, we showed that this case is no less than the third separate attempt by Petitioners to delay and frustrate the progression of the same Section 6 crew-consist notices of June and July 1965 served severally by the General Chairmen of Respondent on approximately 80 railroads, including the Petitioners.

The first suit was brought by Petitioners in January 1966 and sought, *inter alia,* a declaration that the Section 6 crew-consist notices were premature and were ineffective to require negotiations. The General Chairman on each of the Petitioners took the position that the Petitioners' refusal to confer was unlawful, and following such refusals each General Chairman invoked the mediatory services of the National Mediation Board which accepted jurisdiction of the disputes over the railroads' protests.

The District Court agreed with the railroads' contention that the crew-consist notices were premature and directed that negotiations commence. The Court of Appeals, however, reversed the lower Court and held that further conferences were not required because of the railroads' unlawful refusal to bargain, and that the Respondent's invocation of mediation was

proper and mediation should continue.[6] The Court stated (65 LRRM at 2238):

> "We now consider the effect of our reversal of the District Court's ruling that the notices were not effective to require negotiation until after the termination of the Award. As we have seen, conferences are but the first step in the chain of Railway Labor Act procedures. Once they have been frustrated, one side to the dispute can move to the next tier of procedures, and indeed in at least one series of cases involving parties before us the National Mediation Board has accepted jurisdiction of the controversy. *The Carriers have foresaken their right to insist on conferences by their refusal to respect effective Section 6 notices.*" (Emphasis added.)

The Court thus held, in an action to which the Petitioners and Respondents were parties, that *no* further negotiation is required of the June and July 1965 Section 6 notices. The Petitioners' argument here, that Respondent must negotiate these same Section 6 notices on a national basis, is merely an attempt to relitigate the same issue and presents the text book example of a case in which the doctrine of res judicata is applicable. 1B *Moore's Federal Practice,* Second Ed., ¶ 0.401. See also *Commissioner of Internal Revenue* v. *Sunnen,* 333 U.S. 591, 597 (1948).

In the present case, Petitioners insist that Respondent be required to engage in conferences on a national level of disputes concerning which the Court below,

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[6] *Bhd. of Railroad Trainmen, et al.* v. *The Akron & Barberton Belt R.R., et al.,* decided May 12, 1967, not yet officially reported, unofficially reported at 65 LRRM 2229 (D.C. Cir. 1967). Petition for certiorari pending, No. 863.

in the *Akron & Barberton Belt* case, held that Petitioners had "forsaken their right to insist on conferences."

It is true that the Court below declined to apply the doctrine of res judicata in this case. The Court's discussion of the res judicata issue, however, shows that it focused its examination solely on the question of whether this case was res judicata because the Petitioners failed to raise the issue of national handling in one of the prior proceedings. The Court overlooked completely the impact of the decision in the *Akron & Barberton Belt* case that *no* further negotiations, of any kind, were required on these Section 6 notices.

This Court should deny the petition for certiorari because the issue is res judicata.

II. The Petitioners' failure to object to the National Mediation Board's assumption of jurisdiction of the crew-consist disputes estops the Petitioners from contending now that negotiations prior to mediation did not satisfy the bargaining requirements of the Railway Labor Act.

This issue was raised in the Court below but was not passed upon.

The District Court's order of May 31, 1966 directed that (JA 33, ¶3):

> "Conferences within the meaning of Sections 5 and 6 of the Railway Labor Act, at which the parties engage in full-fledged negotiations on the merits of the notices, must be commenced within a reasonable time following the entry of this order."

Following the District Court's order, conferences were undertaken on each of the Petitioners. (JA 433) In no instance did any of Petitioners assert to the General Chairman of the Respondent that the General

Chairman was not negotiating in good faith because he would not agree to national handling of the crew-consist dispute. (JA 158; 282; 259)

Furthermore, in no instance did any of the Petitioners object to the National Mediation Board's assertion of jurisdiction to mediate the separate disputes. Indeed, the Petitioners requested the mediatory services of the Mediation Board in a telegram sent to the Mediation Board on August 2, 1966, in which they asserted that full-fledged conferences had taken place. The telegram stated (JA 396-397):

> "The orders of the United States District Court for the District of Columbia in regard to conferences subsequent to January 25, 1966, have now been carried out or the conferences are now in the process of termination."

It was not until almost thirty days had passed following the termination of the services of the National Mediation Board that the Petitioners filed their complaint alleging that the Respondent had refused to bargain in good faith *prior* to the invocation of the services of the Mediation Board. Having declared to the Mediation Board that the conferences had complied with the order of the District Court, and having requested the Mediation Board to assert jurisdiction to mediate the disputes, the Petitioners now should be estopped from asserting, in effect, that they had misinformed and tried to mislead the Mediation Board and that, in fact, conferences within the meaning of the Act had not taken place.

Accordingly, for this additional reason, the decision of the Court below plainly was correct and no further review is warranted.

III. The Court below was clearly right in holding that the Railway Labor Act does not require that disputes over the issue of crew consist be negotiated in national handling.

The Court below did not hold that national handling of disputes under the Railway Labor Act is unlawful. Nor did it hold that national handling can never be required under the Act. All it held was that the provisions of the Act could not reasonably be construed to require national handling of every dispute which happens to be pending on a number of railroads at the same time. The Court construed the Act as requiring (App. to petition, at 26a),

> "an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements."[7]

The Court applied its principle of an "issue-by-issue" approach to the issue of crew consist and determined that based upon the history of bargaining on the subject, the inescapable conclusion was that national handling was not a reasonable approach and could not be required.

The Petitioners contend that the Court below was in error both in its construction of the Act and in its application of its construction to the issue of crew consist.

The Petitioners argue that the Railway Labor Act *requires* national handling of disputes, over the objection of one of the parties, *every* time there are

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[7] It is in essence the same approach as that adopted by the National Labor Relations Board in determining the appropriateness of a multiemployer bargaining unit. *Chicago Metropolitan Home Builders Assn.*, 119 NLRB No. 141, 41 LRRM 1251 (1957).

similar proposals outstanding on a number of railroads. Under this argument, whether the subject matter of the dispute is appropriate for national handling, whether national handling has ever been attempted in the past, and if so, with what results, become irrelevant considerations. National handling can be required even if the parties are aware that national handling of the disputes in the past resulted in disaster and that continued bargaining on that basis will lead to more of the same. It is difficult to believe that it is seriously urged that the Railway Labor Act intends such result.

The purported statutory basis for the Petitioners' position is Section 1, Sixth of the Railway Labor Act (45 U.S.C. § 151, Sixth) and Section 2, Second of the Act (45 U.S.C. § 152, Second). Section 1, Sixth defines the term "representative" as used in the Railway Labor Act as including,

> "any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

Section 2, Second provides:

> "All disputes between a carrier or carriers and its or their employees shall be considered, and if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

The Petitioners cite the above provisions, emphasize the word "carriers" wherever it appears, and conclude that railroads have "an absolute right" to insist on

national handling of any dispute. It is interesting to note that the use of the word "employees" in the provisions apparently have no significance to the Petitioners. Petitioners have no difficulty in concluding that the provisions permit the "carriers" to dictate a method of bargaining while not permitting the "employees" a similar right.

In reality, Section 1, Sixth and Section 2, Second are not concerned with the *manner* in which bargaining is conducted, but solely with the right of the parties to be represented by representatives of their own choice. In the present case, for example, the Petitioners have chosen to be represented by the National Railway Labor Conference and during the separate mediation sessions between the General Chairman of the Respondent and the representatives of two of the Petitioners (the Atlantic Coast Line Railroad and the Boston and Maine), the railroads included as part of their bargaining teams a representative of the NRLC. (JA 258; 287) The railroads had such right and no objection to such representation was made by either General Chairman.

The distinction between the *manner* in which bargaining occurs and a party's right to be represented by representatives of its own choosing was recently emphasized by the Court of Appeals for the Sixth Circuit. That Court held that a union had the right to withdraw from a multiemployer bargaining unit but that,

> "After the withdrawal in the present case, each publisher would of course still have the right to be represented in separate bargaining by the [multiemployer] Association." *Detroit Newspaper Publishers Assn.* v. *N. L. R. B.*, 372 F. 2d 569 at 572 (6th Cir. 1967).

The Petitioners further argue that Section 2, First of the Act (45 U.S.C. § 152, First) supports their position that national handling can be required of *any* dispute so long as there are similar notices outstanding on a substantial number of railroads. Section 2, First provides:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Thus, the Petitioners would have this Court hold that national handling of every dispute can be required on the basis that a failure to do so is a failure "to exert every reasonable effort" to resolve the dispute. The Court of Appeals rejected this contention, stating (App. to petition, at 25a):

> "The procedures of the Act are purposefully long and drawn out to afford the maximum inducement to peaceful settlement, but the Act does not require efforts clearly at war with reality."

We, too, cannot believe that the Railway Labor Act was intended to foster exercises in futility and precipitate national crises. We cannot believe that Congress intended that parties be submitted to the time, expense, and burden of taking every dispute, which happens to be pending on a number of railroads, to national handling even though all parties know in advance that national handling of such issue has never before worked, will not now settle the dispute, and in

all probability will create a national crisis requiring Congressional intervention.

But there is even a greater danger involved in the Petitioners' thesis. The Petitioners are well aware that in every dispute in which the parties know that national handling will result, the chances that an agreement will result on the local properties during the negotiations prior to national handling approach zero. Such local meetings almost always are perfunctory and entail little more than an agreement of the parties to submit the dispute to their national representatives.

Thus, in situations involving issues such as crew consist, in which every expert body that has ever considered the matter has expressed the opinion that "a national prescription of crew size would be wholly unrealistic"[8] and that local negotiations promise the most encouraging likelihood for agreements, the only hope for agreement would be lost by requiring national handling. Surely it would be a perversion of the Congressional intent to construe the provision requiring parties "to exert every reasonable effort" to resolve disputes in such a way as to render agreement impossible. Yet this precisely is what Petitioners would have this Court hold.

The two cases cited by Petitioners (Pet. at 34) as allegedly supporting their position do no such thing. In *California* v. *Taylor,* 353 U.S. 553 (1957), this Court held that the Railway Labor Act applies to a State-owned railroad. That case had nothing whatsoever to do with the issue here. In *Kennedy* v. *Long Island R.R.,* 211 F. Supp. 478 (S.D.N.Y., 1962), the

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[8] *Railroads* v. *Operating Brotherhoods, Opinion of the Neutral Members* [of Arbitration Board No. 282], 41 Lab. Arb. 680, at 694.

issue involved the legality of the railroads' insurance program pursuant to which a struck railroad would be entitled to funds during the strike. Even a cursory reading of that case shows that it is not authority for the proposition that a party can be required to engage in national handling under the Railway Labor Act. Indeed, such a suggestion was rejected by the Court in *Kennedy*. Thus, the Court stated (at 488):

> ". . . The Long Island's right to insurance payments in case of work stoppage covered by its policy was in no way dependent upon the popularity of the Long Island's bargaining position with other railroads.
>
> "*The record shows that, at no time, was anyone but the Long Island conducting bargaining through its own officers and for itself alone.*" (Emphasis added.)

It is clear that the Court in *Kennedy* held the bargaining lawful not because national handling can be required over the objection of a party but because there was *no* national handling of the dispute.

In summary, not one of the arguments raised by Petitioners is worthy of serious consideration and no further review of the decision of the Court below is warranted.

In the Courts below Respondent took the position that national handling is never required. The Court below held that it is not required on the issue of crew consist, an issue on which national handling has *never* resulted in agreement and has led to national crisis. The decision of the District Court was so clearly at war with the Railway Labor Act and with reality, and was so likely to lead to repeated crises, that the

Solicitor General filed a brief amicus curiae, urging reversal, because of his belief that the District Court decision was "inimical both to the public interest and to the stated purpose of the Railway Labor Act." The Court of Appeals reversed.

The decision of the Court below, that national handling of a dispute is not necessarily mandatory under the Railway Labor Act, is the only judicial decision on the subject. The reason for the absence of judicial precedents on the issue is not because the question never arose in the past. On the contrary, there have been many instances in which one of the parties has refused to bargain a dispute on a national basis when the other side requested it so to do. The simple truth of the matter is that no prior litigation ever arose because never before this case has any party subject to the Railway Labor Act sought to coerce another party through judicial fiat to bargain on a national basis when such other party desired to bargain on a single employer basis.

The following is only one illustration of the fact that the *railroads* always heretofore have understood and taken the position that national handling of a dispute, even where similar notices are outstanding on a substantial number of railroads, results from *agreement* of each of the parties to the dispute, and that absent such agreement any of the parties may refuse to join in national handling of any dispute.

In early February 1951, seventeen nonoperating unions served uniform Section 6 notices for a union shop on all the railroads on which they were representatives, and asked for national handling. (JA 78) The railroads *refused* national handling and direct

negotiations were confined to individual railroads. (JA 114) When the disputes reached mediation, the National Mediation Board attempted to induce national handling in mediation by scheduling mediation on all the railroads for the same time and the same place in the hope that the railroads would appoint one committee to represent them all. It failed. The railroads refused to appoint a single committee.

The dispute eventually went before an Emergency Board (No. 98) which was invoked by the President of the United States acting under Section 10 of the Railway Labor Act (45 U.S.C. § 160). The Emergency Board recommended that the railroads negotiate on a national basis. The railroads still refused. The dispute was ultimately settled by most of the Eastern railroads as a group and on the rest of the country's railroads one by one.[9]

During the course of the proceedings before the Emergency Board, J. W. Oram, now Chairman of the Eastern Carriers' Committee and a member of the NRLC, made the following statement of the railroads'

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[9] The Petitioners argue that Respondent's position here that national handling cannot be required is inconsistent with the position taken by the labor organizations before Emergency Board No. 98. This argument is erroneous. The unions' position was that the Emergency Board in fulfilling its task under Section 10 of the Act to "investigate and report" on the dispute should *recommend* that the dispute be handled on a national basis. The unions never took the position that there was a *legal requirement* that parties engage in national handling. If the unions believed that there was such requirement, such contention would have been made in a court to compel the railroads to engage in national handling and not before an Emergency Board that has no power to require any of the parties to do anything.

position on the issue of whether national handling of a dispute is mandatory. He stated (JA 395-396):

> "Well, the fact is that [issues] have been negotiated on a national basis where the carriers and the employees have both agreed to form conference committees to handle them on a concerted basis, but the mere fact that that has been done in the past does not establish, in my opinion, any custom which would preclude the contrary course of action. *It is entirely dependent upon whether the respective parties are willing to form conference committees to handle it on a concerted basis.*" (Emphasis added.)

We submit that the history of national handling in the railroad industry does not establish the foundation upon which the Respondent can be required to engage in such bargaining over any issue, and certainly not of an issue which has shown itself to be unsuited for national handling.

IV. Assuming a past history of national handling of crew-consist issues, the Respondent's withdrawal from national handling was lawful.

The Court below found that national handling of crew consist was not the practice and could not be required. Accordingly, the Court never reached the question of whether, assuming a past history of national handling of crew-consist issues, the Respondent's withdrawal from national handling was lawful.

The facts established that the General Chairmen of Respondent, at the earliest opportunity, stated to each of the Petitioners, their unqualified refusal to negotiate the crew-consist proposals on a national basis. The Section 6 crew-consist notices, served by the several General Chairmen of the Respondent in June and July, 1965, were served on the separate railroads and requested that negotiations on the notices commence

on the local properties. (JA 26-27) In each case, the particular railroad suggested to the General Chairman that the dispute be submitted to national handling if agreement could not be reached on the property and in each case the General Chairman immediately stated his opposition to national handling and reaffirmed his intention to negotiate the dispute on the local property with the intent of entering into local agreements. (JA 394-395; 433) National handling of the crew-consist disputes never commenced. A year and a half before the service of the Section 6 notices here involved the Respondent made a public pronouncement that it would not again engage in national handling of crew-consist, and the railroads knew of that pronouncement. (JA 308-310; 136-137) And a year before the service of the Section 6 notices the Respondent in convention assembled adopted a resolution that it would not again engage in national handling of crew consist. (JA 415) Accordingly, it is overwhelmingly clear that, at the time the General Chairmen served the Section 6 crew-consist notices in June and July 1965, each was determined that bargaining proceed on a single-carrier basis and each had made such determination clear to the railroad involved.

The right of a union to withdraw from national handling has now been recognized by the National Labor Relations Board and by the Courts of Appeals for the Second and Sixth Circuits and there is no decision to the contrary.

In the Second Circuit case, *Publishers' Assn. of New York City* v. *N.L.R.B.*, 364 F. 2d 293 (1966), *cert. den.* 385 U.S. 971 (1966), a union had given timely and unequivocal notice to each of the members of an association that it no longer desired to bargain on a

multiemployer basis and desired to bargain with each member of the association separately. *The multiemployer unit had been in existence for more than 50 years.* The position of the union was sustained both by the N.L.R.B. and the Court of Appeals.[10]

The Court of Appeals for the Sixth Circuit reached the same result in *Detroit Newspaper Publishers Assn.* v. *N.L.R.B.*, 372 F. 2d 569 (1967). The facts are almost identical with those of the Second Circuit case except that in the *Detroit Newspaper* case the multiemployer unit had been in existence for a quarter of a century instead of half a century as in *Publishers' Assn.*

Accordingly, the Respondent's timely and unequivocal refusal to engage in national handling of the crew-consist disputes is a further basis supporting the decision of the Court below and is an additional reason for this Court to refuse to review that decision.

CONCLUSION

Stripped of its circumlocution, the Petitioners' basic argument comes down to the proposition that where the same or similar disputes are pending between a

[10] The Petitioners seek to undermine the holding of *Publishers' Assn.* on the ground that that decision was based on the Court's belief that the employers could resort to a lockout if one of the employers was struck and that since it is doubtful that a lockout in the railroad industry is lawful, the decision is not in point. This assertion is directly contrary to the opinion rendered by the Court and the concurring opinion. In both opinions it was made clear that a consideration of the "potential effectiveness of economic weapons" was not a factor in determining whether a union could withdraw from multiemployer bargaining. The similar principle was enunciated by this Court in *N.L.R.B.* v. *Brown*, 380 U.S. 278, 283 (1965) and in *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 317-318 (1965).

railroad union and a substantial number of railroads, it is unlawful for the union to progress the resolution of the disputes in any manner that will not lead to a national emergency if agreement is not reached. It is difficult to believe that it is seriously urged that the Railway Labor Act intended such result.

The petition for certiorari should be denied.

Respectfully submitted,

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